

PUBLIC LAW BOARD NO. 7120

(BROTHERHOOD OF MAINTENANCE OF WAY
PARTIES TO DISPUTE: (EMPLOYES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated October 16, 2009, M. C. McLain, Roadmaster-Marion, instructed L. A. Semler (hereinafter "the Claimant") to attend a formal Investigation on November 6, 2009, at the Carrier's Great Lakes Division Office in Strongsville, Ohio, "to determine the facts and place your responsibility, if any, in connection with an incident that occurred on Thursday, October 08, 2009, at MP QI 36.4, on the Greenwich Subdivision, when a surfacing team, with you as Foreman, left the track in a manner inconsistent with CSX Maintenance of Way Instructions, resulting in delays in completing of State Route 18, in the town of Wellington, OH." In connection with the foregoing, the letter stated, the Claimant was "charged with willfully neglecting your duties as the Employee in Charge, failure to perform the responsibilities of your position in a safe and efficient manner, and with possible violation of, but not limited to, CSXT Operating Rules General Rules A and S, General Regulations GR-2 and GR16, along with Maintenance of Way Instructions 1103, Surface Policy, and Maintenance of Way Instruction 1113, Performance Standards for Track Maintenance Work, more particularly the sections that deal with surfacing track."

FINDINGS:

Public Law Board No. 7120, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Roadmaster McLain assigned the Claimant, who was foreman of a surfacing team, to perform the surfacing operation in the rebuilding of a road crossing on State Route 18 in Wellington, Ohio. The first step in the rebuilding project was to install a track panel approximately 160 feet in length. The next step was for the surfacing team to surface the track and align it. This was to be followed by the installation of wooden timbers and blacktopping of the crossing by still other teams.

The Claimant's team performed the surfacing work on Thursday, October 8, 2009. When the gang arrived to install the timbers on Friday morning, October 9, they saw that number two track was out of line and number one track was about two inches low. They could not install the timbers without first correcting the track defects. Track Foreman Patrick attempted to get track time for a tamping team to come in and align track two and raise track one, but the dispatcher would not permit the work to be done until around 1:00

p.m. Foreman Patrick informed Roadmaster McLain that he could not install the timbers until the track defects were corrected.

When track time was finally obtained, the Tamper Operator and Ballast Regulator Operator who had worked on the project the previous day were called in to correct the defects and accomplished the work in about 90 minutes. This included approximately 30 minutes to repair a problem with the tamper machine. In order to do the tamping and ballast work, train passage over the tracks involved had to be halted. Train traffic did not have to be stopped for installation of the timbers.

The Tamper Operator was an inexperienced operator who had operated a tamper machine for only approximately three months. This was his first assignment to tamp a panel installation. The Claimant acknowledged that he was aware that track two was out of alignment when his surfacing team stopped working on Thursday, October 8. He testified that he “finally obtained a good profile and cross level [on track two] and I said stop right there; let’s get the machine folded up and I called Foreman Sanders, if they [sic there?] would have been a backhoe on side [sic site?] that day I would have lined it, which has been done in my 40 years and it’s a common practice with us older employees and this problem would not have occurred.”

The Claimant’s testimony continued, “I did not have a backhoe, so I called the foreman who was coming the next day to line this spot out which ran into the joint. Now when we left it looked bad going into the joint but it was within standards and the track

was safe; #1 thing, I would not leave the track in unsafe condition. As I called the foreman and he was bringing his backhoe the next day to put the timbers in and he informed me he would do it. . . .”

In answer to questions from the hearing officer, the Claimant acknowledged that his assignment for October 8 was to go out and surface both tracks with the expectation to have perfect track. He did not have perfect track on October 8 when he stopped work on the track that day, the Claimant further acknowledged, and he did not provide that information to the Roadmaster.

Following the close of the hearing the Division Engineer–Great Lakes Division, by letter dated November 23, 2009, notified the Claimant that the Carrier had determined that he was “guilty as charged.” The letter stated, “The fact that you admitted the crossing was not completed to standards that prevented the roadway being completed on schedule, and the fact that you admitted not contacting the Roadmaster to inform him of that, was conclusive evidence of your responsibility in this matter.” The Division Engineer assessed a ten-day overhead suspension “for a period of twelve (12) months as discipline, said period to begin effective November 13, 2009 until and including November 13, 2010.”

In a closing statement the Claimant attributed the problem that brought on the hearing in this case to the Carrier’s failure to provide adequate training to the Tamper Operator who had not properly aligned track two on Thursday, October 8, 2009. Had a

qualified operator surfaced the track in question, he stated, “we would not be having this conversation.” In addition, the Claimant asserted, the panel was not installed properly on Sunday, October 4, in that it was not placed deep enough, and there was a hump in the track.

In its closing argument the Organization contended that the Carrier has not met its burden of proof. The Carrier, the Organization argues, has failed to provide any information that the State Road 18 project was delayed as the result of anything that the Claimant did. The track, the Organization asserts, was not left in any manner that was inconsistent with CSX Maintenance of Way Instructions. Regarding any track defect, the Organization contends that the Claimant “took the appropriate measures to facilitate that repair being done the next day on his [the Claimant’s] rest day by another Foreman Dana Sanders.” The Organization asserts that the “Carrier was well aware of Mr. Sanders’s participation in all of this, yet they failed to call him in as a witness.”

The Organization argues that the testimonies of Track Foreman Denny Patrick and Roadmaster McLain are in conflict. Roadmaster McLain, the Organization notes, testified that Thursday night October 8, at around 8:00 p.m., he visited the panel installation site at the crossing and saw that the track was out of line. Foreman Patrick testified that Thursday evening Roadmaster McLain told him that track two was ready for timbers to be put in on Friday morning. The Organization considers it inconsistent that the Roadmaster should find the track out of line and then turn around and give orders to

Foreman Patrick to put timbers in. The Organization also finds it inconsistent that the Roadmaster should testify that he was informed of the track condition on Friday morning by Foreman Patrick if he himself had observed the track condition the previous night on his visit to the work site. “So somebody is not being forthright here with their facts,” the Organization contends, “and we don’t feel that Mr. Semler has been afforded a fair and impartial hearing. . . .”

The evidence is not in dispute that the Claimant did not complete his assignment on Thursday, October 8, as instructed by the Roadmaster, and did not inform the Roadmaster that track two was out of line although aware of that fact. Instead, according to the testimony of the Roadmaster, not challenged by the Claimant, the Claimant called the Roadmaster at 1:08 p.m. on Thursday and said that “he needed to bust the 707.” (Tr. 13, 121).

By stopping work on October 8 although track 2 was not aligned, the Claimant “left the track in a manner inconsistent with CSX Maintenance of Way Instructions,” as alleged in the charge letter. Surfacing Policy MWI 1103-04 states in part I. A, “The goal of this track surfacing policy is to ensure that the work meets or exceeds all CSXT and FRA standards, as well as Engineering Department goals for safety and quality. . . .” CSXT and FRA standards were not met because of the misalignment of track 2.

The condition of the track was also inconsistent with MWI 1113-02 Performance Standards for Track Maintenance Work. The section of the Performance Standards

covering Surfacing states in the column for Alignment: "1. MWI 1103 - During surfacing, the track should be lined as near perfect as possible utilizing automatic lining equipment." For Class III track (40 MPH Freight, 60 MPH Passenger) the tolerance allowed is 3/8 inch. Track two, on which the permitted speed was 50 MPH Freight and 60 MPH Passenger (Tr. 16), was "an inch, inch and a-half out of line." (Tr. 40).

The Board finds that the Carrier has established by substantial evidence that the Claimant left the track on Thursday, October 8, "in a manner inconsistent with CSX Maintenance of Way Instructions," and in violation of "Maintenance of Way Instruction 1113, Performance Standards for Track Maintenance Work, more particularly the sections that deal with surfacing track," as alleged in the charge letter. Leaving the track in the condition that he did without informing the Roadmaster that the track alignment was off also constituted neglect of duties and failure to perform the responsibilities of his position on the part of the Claimant, also as alleged in the charge letter.

At 1:08 p.m. the Claimant still had almost four hours to go to his normal quitting time. Had he informed the Roadmaster of the condition of the track, there was still plenty of time to correct any defects. According to the evidence, it took approximately 90 minutes the next day for the Tamper Operator and the Ballast Regulator Operator to bring both tracks one and two up to proper standards the next day. The Claimant's explanation that he decided to go into the clear because he did not have a backhoe at his disposal to correct the misalignment is not persuasive for several reasons.

First, Performance Standards MW 1113-02 says that the track should be lined “utilizing automatic lining equipment.” A backhoe does not fit that description. Second, Track Foreman Patrick testified that he would not have used a backhoe to line 160 feet of track (Tr. 43). Third, the misalignment of track two was repaired the next day, Friday, not by a backhoe operator but by the very same Tamper Operator and Ballast Regulator Operator who performed the surfacing work on Thursday. Fourth, it was not the Claimant’s call to make on whether to attempt to get the surfacing finished on Thursday, October 8, or to wait to the next day to do it with a backhoe. He should have informed the Roadmaster of the situation and let him make the call.

The Carrier has also provided substantial evidence that the Claimant’s failure to complete the surfacing on Thursday, October 8, delayed the completion of the work on State Route 18 in the town of Wellington, Ohio. Had the Claimant completed the surfacing on Thursday, Foreman Patrick’s team could have put the timbers in on Friday morning, for which track time was not necessary, and the blacktop crew could have paved the crossing that afternoon or Saturday at the latest. Because track time could not be obtained on Friday for the tamping and ballast regulator work until the afternoon, the blacktop work could not be done until Monday. The Carrier has established by substantial evidence that the failure to complete the surfacing work on Thursday resulted in a delay in completing the work on State Route 18.

Whether Track Foreman Patrick and Roadmaster McLain gave inconsistent

testimony regarding when Mr. McLain first had knowledge that track two was misaligned is not relevant to the question of whether there is merit to the charges against the Claimant. The facts that he knowingly left track two out of alignment on Thursday, October 8, without notifying his Roadmaster at an hour of the day when there was still time to correct the defect; and that the failure to complete the surfacing work on Thursday resulted in the blacktop work not being done until the following Monday are not in dispute. Those facts are sufficient to establish the charges against the Claimant.

Nevertheless, the evidence does not establish that Roadmaster McLean gave testimony that was not truthful. He testified that at approximately 2000 hours on Thursday he went to the crossing site to observe the track and noticed a line in the track. He stated, "I proceeded then to retire for the day, knowing then there was nothing else we could do for the immediate day." The next day, Roadmaster McLain testified, when the maintenance team showed up to install the track panel, they called him and said that they were refusing to put the track wood in because the track was out of line. Mr. McLain produced his cell phone billing records which showed that he received a telephone call from Foreman Patrick on Friday morning at 9:57 o'clock. There is no evidence that Roadmaster McLain's instruction on Thursday to Foreman Patrick to install the timbers at the crossing was given after he visited the site at 2000 hours.

One additional point should be mentioned. The ten-day overhead suspension was for a 12-month period beginning on November 13, 2009. The last day of the 12-month

period would be November 12, 2010, not November 13, as stated in the decision letter.

A W A R D

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that
an Award favorable to the Claimant not be made.

A handwritten signature in dark ink, appearing to read "Sinclair Kossoff", is written over a horizontal line.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
March 28, 2010